



June 18, 2001

Ms. Paula A. Jones
General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2001-2592

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147900.

The Employees Retirement System of Texas ("ERS") received the following three requests for information:

1. All Public Information indicating SFG's desire to terminate its contract with the ERS and/or State of Texas.
2. All Public Information supporting the contention that [a named individual] is unsuited to the position of Retirement Systems Benefit Specialist II for Benefit Operations of the Customer Service Division.
3. [A]ll Public Information contained in the personnel files of [three named individuals from the] ERS staff.

On March 22, 2001, the requestor clarified request number 3, indicating the types of information that are not include in the request. You state that most of the information responsive to the three requests has been made available to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.107, 552.111, and 815.503 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first consider the exceptions that you claim with regard to request number 1, which is for “[a]ll Public Information indicating SFG’s desire to terminate its contract with the ERS and/or State of Texas.” You explain that, although the request does not identify “SFG”, you believe that this acronym refers to Security First Group, Inc. (d/b/a SFG Benefits Administration), a third-party administrator that contracts with ERS to provide record-keeping and deferred-compensation account-management functions associated with the TexasSaver 401(k) and 457 deferred compensation plans (“TexaSaver Program”). You explain that the TexaSaver Program is a voluntary deferred compensation investment program for state employees and certain state higher education employees. You also explain that ERS and SFG are involved in a contract dispute and that all communications within ERS concerning this matter are highly sensitive thought processes, strategy, and analysis of ERS.

You state that you have found 24 documents that are potentially responsive to the request relating to the SFG contract. Of those documents, you state that 2 documents, amounting to 16 pages, are public information that have been published on the ERS’ Internet web site and will therefore be provided for the requestor’s review. In addition, you state that three letters, representing correspondence between ERS and SFG between February 16, 2001 and March 16, 2001, will also be provided for the requestor’s review. You claim that the other 19 documents, which you have submitted as Appendices A - S, have not been released to the requestor and are subject to one or more exceptions from public disclosure. We now consider the exceptions that you claim for the information contained in those documents.

You claim that the information in Appendices A, F, H, Q, and S is protected from disclosure by section 552.103. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated at the time of the request, and (2) the information at issue is related to that litigation. *University of Tex.*

Law Sch. v. Texas Legal Found., 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

Here, you state that SFG made statements on February 15, 2001 indicating a future inability or refusal to perform its contractual functions with ERS. You further state that ERS is evaluating its remedies, including possible litigation against SFG for its decision. Based on your arguments and our review of the submitted documents, we agree that litigation was reasonably anticipated at the time of the request. We also agree that they are related to the anticipated litigation. Thus, you may withhold Appendices A, F, H, Q, and S under section 552.103.²

Next, you claim that certain information within Appendices J, K, L, and P is excepted from disclosure under section 552.107 of the Act. Section 552.107(1) protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990).

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

²Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You inform us that the statements made in those documents were made by ERS legal counsel to provide legal advice to ERS executive management and the ERS board, or that they are statements between ERS legal counsel and other officers of the agency. Based on your representation and our review of Appendices J, K, L, and P, we have marked the information that is protected by the attorney-client privilege and may be withheld under section 552.107.

Next, you claim that certain information within Appendices B, C, D, E, G, I, M, N, and O is excepted from disclosure under the agency memoranda exception in section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). This office also held that an agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5 (1993). Here, you state that the notes in question include advice, opinions, or recommendations that were contemplated in the agency's deliberative process. Based on your representation and our review of the documents in question, we have marked the information that you may withhold under section 552.111.

You next claim that many of the records that are responsive to request numbers 2 and 3 are made confidential by section 815.503 of the Government Code and are therefore excepted from disclosure under section 552.101. Section 815.503 provides, in relevant part:

(a) Records of members and annuitants under retirement plans administered by the [Employees Retirement System] that are in the custody of the system or of an administrator, carrier, or other governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section.

You state that some of the information within the submitted documents reveals the names, dollar amounts of deferred compensation distributions, and social security numbers of ERS members who are state employees. In addition, the requestor does not appear to be within the class of persons to whom the ERS may release confidential retirement information under section 815.503(b). Because section 815.503(b) only applies to "records of members and

annuitants,” we do not believe that it makes the identities of those persons confidential in all documents maintained by ERS. We have marked the records that are confidential under section 815.503(a) of the Government Code and must therefore be withheld under section 552.101.

We also find that some of the information within the submitted documents is protected by common law privacy. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure under common law privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). This office has held that personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). We find that certain information with the submitted documents falls into this category. Thus, you must withhold the information that we have marked that is protected by common law privacy and is therefore excepted from disclosure under section 552.101.

Next, you claim that some of the information that is responsive to request numbers 2 and 3 is protected from disclosure by section 552.102. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy, which is incorporated into the Public Information Act by section 552.101.

Here, you argue that some of the information in the requested personnel files concerns intimate facts about certain ERS employees’ private affairs, such as private relationships or potentially embarrassing opinions regarding particular behavior. You claim that this information is not of legitimate concern to the public. This office has held, however, that a public employee’s job performance does not generally constitute his private affairs. Open Records Decision No. 470 (1987). Furthermore, even highly subjective evaluations of public employees may not ordinarily be withheld under common law privacy. Open Records Decision No. 473 (1987). “The fact that a public employee receives a less than perfect – or even a very bad – evaluation is not the type of information protected by common-law privacy; it is not a highly intimate or embarrassing fact about the employee’s personal affairs.” *Id.*

Finally, we note that the submitted social security numbers may be protected under section 552.101. A social security number is excepted from required public disclosure under

section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). On the other hand, if the social security numbers were not obtained or maintained by ERS pursuant to any provision of law enacted on or after October 1, 1990, then they are not confidential under the federal Social Security Act and may not be withheld under section 552.101.

Summary

Request Number 1: You may withhold Appendices A, F, H, Q, and S under section 552.103. You may withhold the information that we have marked in Appendices J, K, L, and P under section 552.107 and the attorney-client privilege. You may withhold the information that we have marked in Appendices B, C, D, E, G, I, M, N, and O under section 552.111 and the agency memoranda exception. All of the remaining information that is responsive to request number 1 must be released to the requestor.

Request Numbers 2 and 3: You must withhold the records that we have marked as confidential under section 815.503 of the Government Code. You must withhold, under section 552.101, the personal financial information that we have marked that is protected by common law privacy. The social security numbers may be confidential under federal law, depending on when and how they were obtained. All of the remaining information that is responsive to request numbers 2 and 3 must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;


2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 147900

Encl. Submitted documents

cc: Mr. Ridgely C. Bennett
2809 Pioneer Way
Round Rock, Texas 78664
(w/o enclosures)